

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-99000-smb

4 Adversary No. 08-01789-smb

5 Adversary No. 09-01161-smb

6 - - - - - x

7 In the Matter of:

8 SECURITIES INVESTOR PROTECTION CORPORATION,

9 Plaintiff

10 v.

11 BERNARD L. MADOFF INVESTMENT SECUR.,

12 Defendant

13 - - - - - x

14 In the Matter of:

15 PICARD,

16 Plaintiff

17 v.

18 KINGATE GLOBAL FUND, LTD. ET AL,

19 Defendants

20 - - - - - x

21 U.S. Bankruptcy Court

22 One Bowling Green

23 New York, New York

24 November 19, 2014

25 9:59 AM

1 B E F O R E :

2 HON STUART M. BERNSTEIN

3 U.S. BANKRUPTCY JUDGE

4

5 ECR OPERATOR: W. RODRIGUEZ

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 Hearing re: Administrative case no. 08-01789: Hearing on
2 presentment of order concerning further proceedings on
3 extraterritoriality motion and trustee's omnibus motion for
4 leave to replead and for limited discovery.

5

6 Hearing re: Administrative case no. 09-01161: Conference re
7 FIM Defendants' Nov. 14 Letter

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25 Transcribed by: Jamie Gallagher

1 A P P E A R A N C E S :

2 BAKER HOSTETLER

3 Attorneys for Irving Picard, Trustee

4 45 Rockefeller Plaza

5 New York, NY 10111

6

7 BY: THOMAS L. LONG, ESQ.

8 REGINA L. GRIFFIN, ESQ.

9 GERALDINE PONTO, ESQ.

10

11 FOLKENFLIK & MCGERITY, LLP

12 Attorney for the Defendants

13 1500 Broadway

14 New York, NY 10036

15

16 BY: MAX FOLKENFLIK, ESQ.

17

18 SECURITIES INVESTOR PROTECTION CORPORATION

19 Counsel for Dispute Resolution

20 805 15th Street, NW

21 Suite 800

22 Washington, DC 20005

23

24 BY: KEVIN BELL, ESQ.

25

1 GIBSON DUNN & CRUTCHER, LLP
2 Attorney for UBS Defendants
3 200 Park Avenue
4 New York, NY 10166
5

6 BY: MARSHALL KING, ESQ.
7

8 DICKSTEIN SHAPIRO, LLP
9 Attorney for Defendants
10 1633 Broadway
11 New York, NY 10019
12

13 BY: ERIC FISHER, ESQ.
14

15 LOWENSTEIN SANDLER, LLP
16 Attorneys for Bureau Labor Insurance
17 1251 Avenue of the Americas
18 New York, NY 10020
19

20 BY: AMIAD KUSHNER, ESQ.
21 JAMIE GOTTLIEB, ESQ.
22
23
24
25

1 PAUL HASTINGS, LLP

2 Attorneys for Defendants

3 75 East 55th Street

4 New York, NY 10022

5

6 BY: MOR WETZLER, ESQ.

7 JODI AILEEN KLEINICK, ESQ.

8

9 ARNOLD & PORTER, LLP

10 Attorney for Merrill Lynch International

11 399 Park Avenue

12 New York, NY 10022

13

14 BY: PAMELA MILLER, ESQ.

15

16 SULLIVAN & WORCESTER, LLP

17 1633 Broadway

18 New York, NY 10019

19

20 BY: FRANKLIN VELIE, ESQ.

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

THE COURT: Madoff.

MS. GRIFFIN: Good morning, Your Honor. Regina Griffin, Baker Hostetler, counsel for the trustee.

THE COURT: Thank you.

MR. LONG: Good morning, Your Honor. Thomas Long on behalf of the trustee.

MR. KING: Good morning, Your Honor. Marshall King from Gibson Dunn & Crutcher on behalf of the UBS defendants.

THE COURT: Okay, go ahead.

MS. GRIFFIN: Thank you, Your Honor. We had forwarded to Your Honor and filed last evening an amended notice of agenda for matters. And if you would like to go in a different order, but what we had listed first was the notice of hearing on an order concerning further proceedings on the extraterritoriality motion.

THE COURT: Go ahead.

MS. GRIFFIN: Your Honor, I don't know if you would want counsel for the objecting parties to go first, but I'm happy to speak first.

THE COURT: Would you like to go first?

MR. KING: I'm happy to go first, Your Honor.

THE COURT: Go ahead.

MR. KING: Thank you, Your Honor. Marshall King

1 from Gibson Dunn & Crutcher on behalf of the UBS defendants.

2 If Your Honor has read the papers, the dispute
3 is --

4 THE COURT: I have.

5 MR. KING: -- very focused on one paragraph of the
6 proposed procedures and it would provide an exemption to the
7 trustee to do things with confidential material that the
8 trustee is not currently entitled to do under the governing
9 orders that are in place in this case that govern when UBS
10 and others produce documents and on which they relied when
11 producing documents. The trustee doesn't really dispute
12 that it's seeking a modification in some way to do things
13 that it isn't otherwise permitted to do. The Second Circuit
14 case law is clear. In order to do what they want to do,
15 they need to show extraordinary circumstances or a
16 compelling need. The trustee doesn't contest the legal
17 standard, doesn't suggest they've satisfied the legal
18 standard, doesn't try to distinguish the cases. All they
19 say is, well, it's reasonable under the circumstances, in
20 party because you know, we're the only ones or one of two
21 parties who have raised an objection here.

22 Respectfully, reasonableness is not the test. And
23 abrogating the rights that UBS and others have under the
24 governing orders is not open to majority vote. It's a
25 question of have they satisfied the Second Circuit standard.

1 The trustee's justification is somewhat sympathetic when
2 viewed narrowly. They have a lot of parties they have sued.
3 They have a lot of parties whose complaints they wish to
4 amend, I sympathize with the poor associates at Baker
5 Hostetler who have the job to assemble the amended
6 complaints that they wish to put forward but these are
7 problems of their own making. They agreed to these
8 restrictions in the protective orders at -- originally.
9 They agreed again when they came back to the Court saying,
10 you know, these procedures are somewhat burdensome. We'd
11 like a litigation protective order. There was a battle
12 about that, compromises on both sides. Everyone agreed.
13 And they got a litigation protective order that governs the
14 procedures that one has to follow when using information
15 that's been designated as confidential. They knew that
16 there were all these multiple litigations at that time.
17 They knew it was a bit of a pain to deal with all this
18 confidential stuff that, you know, having gotten thousands
19 of parties to produce millions of documents and benefit the
20 trustee, they realize, okay, well we gave up a lot to get
21 that. We gave up some to get that, namely, we agreed these
22 restrictions and they should be held to those restrictions.
23 You can't just abandon them when they become
24 somewhat inconvenient to you. No one required them to sue
25 thousands of defendants. No one required them to seek leave

1 to amend complaints that they now admit are deficient and
2 need amendment in order to survive. That's a problem of
3 their own making. So that initial sympathy that I have for
4 the poor associates at Baker Hostetler is really greatly
5 overcome by -- they've gotten a great benefit here. These
6 are problems of their own making. They agreed to these
7 things and it is not fair to UBS or to others that these
8 restrictions be limited.

9 The idea that this is necessary because of this
10 expedited schedule that is a bit of a fallacy. They filed a
11 motion to amend in August. If Your Honor signs an order
12 today, their amended complaints -- the proposed amended
13 complaints will be due in February, nearly six months later.
14 And even then, the motions will not be fully submitted to
15 Your Honor until April if Your Honor signs an order today.
16 That would be eight months from the day that they raise
17 their hand and said hey, Judge, we want to amend these
18 complaints. That's a lot of time.

19 So I recognize that the trustee has a lot of work
20 to. The solutions are live up to their obligations that
21 they agreed to and that were in place under the protective
22 orders, either invoke the procedures to designate documents
23 that they think were improperly designated and let that run
24 its course or file under seal and essentially put the burden
25 on us to justify to Your Honor why it should remain under

1 seal. We don't have to solve this problem today. We have
2 time to figure out what do they want to use and what is the
3 fight that we are going, if any, we're going to have over
4 that. We may have no fight. We have in the past resolved
5 issues. On one occasion it did come to the Court and the
6 Court made a ruling, this is before Your Honor had the case,
7 but those procedures, you know, are what everybody agreed to
8 and what are reasonable.

9 Another solution, I think, is if everyone else
10 really does think this is a reasonable approach for them,
11 let's carve UBS and Merrill Lynch out, and they've only got
12 a deal with this confidentiality issue with respect to two
13 parties. And I will bet you, Your Honor, that the day UBS
14 stood up and objected to this procedure, they began
15 immediately cracking down on figuring out what they want to
16 use as to UBS, and have been diligently been working on
17 that. There's plenty of time for us to resolve any issues
18 that we have on that issue.

19 The last solution, of course, is nobody's making
20 them amend. Nobody's forcing them to amend. Judge Rakoff
21 effectively has said there's really on one thing that
22 matters. Where was the transferor and where is the
23 subsequent transferee. And if they're both located
24 overseas, it's an extraterritorial transfer beyond the scope
25 of Section 550(a). So, you know, truthfully, in our view,

1 all of these amendments are a waste of time. They are
2 entitled to argue otherwise, but their desire to argue
3 otherwise doesn't justify overwhelming the rights that we
4 negotiated for that have been in place for the last four
5 years.

6 THE COURT: Thank you.

7 MR. KING: Thank you, Your Honor.

8 MS. GRIFFIN: Your honor, essentially, what we
9 negotiated with the defendants was, and I know you've read
10 the papers, so I'm not going to repeat it, it's not seeking
11 to modify. It was basically an advanced dialogue with the
12 defendants about understanding what the parameters are that
13 the parties have with respect to the protective order. And
14 almost all of the defendants basically agree that they would
15 not interpret the protective order to prohibit the trustee
16 from making general allegations.

17 To be crystal clear, we do -- the trustee intends
18 to abide by the terms of the protective order to the extent
19 we intend to quote, to paraphrase, or to otherwise reveal
20 the contents of documents in there. But what this was, was
21 an attempt to get the defendants what they wanted, which was
22 expedited briefing on the extraterritoriality issue, get the
23 trustee what he wanted in terms of an orderly process, and
24 in terms of when the discovery motion is heard, when the
25 full complaints are filed versus when the allegations are

1 filed. And we have -- you know, through extensive efforts
2 with coordinating counsel, we think we've come to a good
3 place of agreement with the defendants and that was really
4 what we were trying to accomplish. 81 days doesn't sound
5 like much, but when you have the history of knowing that so
6 many parties have come in and challenged things, have
7 blanket designated as Merrill Lynch and the UBS defendants
8 did, their entire document production, I can't make even a
9 general allegation under their interpretation that they
10 received transfers at a New York bank account. That's
11 totally hypothetical, not basing it on any documents in
12 Merrill Lynch or UBS's arsenal that they produced. But the
13 problem therein, Your Honor, is we wanted to make sure that
14 in 100 different lawsuits, you weren't dealing with
15 confidentiality de-designation issues.

16 THE COURT: But you only have two now. You only
17 have --

18 MS. GRIFFIN: Well --

19 THE COURT: -- two objectors.

20 MS. GRIFFIN: That's where we are, Your Honor.

21 And I guess where we're sitting with them is we wanted to
22 make sure that we could get to you and file on the 81st day
23 our papers under seal. In the past, the courts have been
24 very reluctant to having us, you know, file things under
25 seal but that's currently where we are. We hope, and by the

1 way, we've been working on this, and unfortunately Your
2 Honor is going to start to see requests under the de-
3 designation process where if the parties can't work it out,
4 and we are definitely trying -- going to try and work it out
5 with everybody. This advanced negotiation with defendants
6 is a step in that direction, that we're all working towards
7 that common goal. But essentially, Your Honor, we -- I
8 guess this is a way of letting the Court know that you may
9 have to decide before you at least get to the
10 extraterritoriality decision on their cases some
11 confidentiality issues, some under seal issues, and all of
12 that. And so they may not be able to stop to the same
13 schedule, and that's where we are.

14 THE COURT: Okay. Anyone else want to be heard?

15 MS. MILLER: Your Honor. Your Honor, I'm Pam
16 Miller from Arnold & Porter for Merrill Lynch International.

17 As you know, we filed a (indiscernible) filing and
18 I endorse all the statements made by Mr. King from Gibson
19 Dunn on behalf of UBS. The only thing I wanted to add is he
20 talked about the high standard for modifying a protective
21 order and that is certainly the case. The Second Circuit
22 talks about an additional element to that, which is
23 presumptively unfair to modify a protective order when the
24 parties have acted in reliance on that protective order.
25 And I wanted to rise just briefly to tell you the history.

1 THE COURT: See, the impression I'm getting from
2 Ms. Griffin's argument is they're not violating the
3 protective order. They want to clarify what might be a
4 dispute under the protective order, is that what you're
5 saying?

6 MS. GRIFFIN: Yes, Your Honor.

7 THE COURT: All right. So they tell me they're
8 not violating the protective order.

9 MS. MILLER: No, but the problem is that
10 paragraph --

11 THE COURT: So you say, go ahead, do what you
12 think is right at your peril, right?

13 MS. MILLER: Well, right, paragraph 7 is vague
14 enough --

15 THE COURT: Right.

16 MS. MILLER: -- but I don't think that we can
17 allow them to proceed. Once the toothpaste is out of the
18 tube, it's too late to put it back in.

19 THE COURT: That's true.

20 MS. MILLER: As Mr. King says, if they are only
21 dealing with two objectors, they certainly can come to us.
22 They have come to us in the past to de-designate, and we'd
23 be happy to have that dialogue with them. I did just want
24 Your Honor to know that the documents at issue here, MLI is
25 a UK-based entity. When the first subpoena was served over

1 five years ago in September of 2009, we told the trustee
2 that in order to get documents from the UK, it would need to
3 start a disclosure proceeding in the UK under UK law. In
4 order to absolve them of that burden and to cooperate, we
5 voluntarily produced documents, but only after we entered
6 into a confidentiality order with them. And that
7 confidentiality order, which is before the Court, it's
8 docket number 15 in our adversary proceeding, which is 05-
9 346, has two key provisions that have been carried through
10 through every protective order that has subsequently been
11 entered.

12 The first one, which I just want to ring to Your
13 Honor's attention is that it expressly said that, and this
14 is a quote, "MLI may designate any or all of the documents
15 that MLI is voluntarily producing as confidential." That
16 was a bargain that we negotiated with the trustee. So the
17 over-designation that they're not complaining about is of
18 their own making. And as I've said, we've been willing to
19 undesignated when necessary.

20 And the second provision, which was much more
21 important, is that any of those documents, to the extent
22 they wanted to refer to them in public filings, the filings
23 either needed to be made under seal or they needed to come
24 to us to de-designate. We have insisted that that
25 protection is carried forward in every protective order and

1 it is fair to say that when MLI made the decision to
2 disclose those documents, which contain material that would
3 be confidential under EU data privacy laws, contained
4 information about customers, contained information about
5 MLI's strategy. It did so on express reliance of those two
6 provisions. And for that additional reason, I would ask
7 that Your Honor -- respectfully ask that Your Honor strike
8 paragraph 7. Thank you.

9 THE COURT: Yes.

10 MS. GRIFFIN: Your Honor, I -- just for the
11 record, I think there's a dispute with Merrill Lynch that we
12 don't have to resolve here about which confidentiality
13 agreement governs the situation. I think what we're really
14 coming down to is if we're dealing -- if you're looking at
15 this from the context of we're only dealing with two parties
16 essentially at this point, maybe -- I guess, just getting
17 them to -- directing them to use their best efforts to
18 cooperate with us through the de-designation process so we
19 can avoid having to burden the Court. We've accomplished
20 much already if that's where you're intending to go.

21 THE COURT: But doesn't the confidentiality order
22 implicitly require cooperation, if not expressly?

23 MS. GRIFFIN: It certainly requires the parties to
24 work in good faith. But in terms of meeting this expedited
25 schedule, Your Honor, it's almost like we're asking --

1 they're asking to participate in something that's going to
2 require significant diverted resources from the Court as
3 well as --

4 THE COURT: Well, why don't you just show them
5 what you intend to use and see what their response is?

6 MS. GRIFFIN: We absolutely intend to, Your Honor.
7 It really is just --

8 THE COURT: You're asking me to decide this in a
9 vacuum, which is part of the problem.

10 MS. GRIFFIN: I understand that, Your Honor, and
11 the provision was never meant to litigate issues --

12 THE COURT: Right.

13 MS. GRIFFIN: -- under the protective order.

14 THE COURT: Look, as far as I'm concerned,
15 documents were produced under a confidentiality -- under a
16 promise of confidentiality and the order provides for a
17 resolution of any dispute. You tell me that your intended
18 use doesn't violate the order, but since I don't know really
19 what your intended use is, it's very hard to make that
20 determination. You're down to two objectors, UBS and
21 Merrill Lynch will be carved out of paragraph 7. Otherwise,
22 nobody else has a problem with paragraph 7, that's fine.
23 And that's the way we'll do it, all right?

24 MS. GRIFFIN: Thank you, Your Honor.

25 THE COURT: All right, so you can submit a revised

1 order which carves them out and I'll sign the order.

2 MS. GRIFFIN: We'll do so, Your Honor.

3 THE COURT: All right.

4 MR. KING: Thank you, Your Honor.

5 THE COURT: I had some other issues regarding
6 inclusion or exclusion from this order? Yes?

7 MS. GRIFFIN: I guess we'll --

8 THE COURT: Mr. Fisher?

9 MR. FISHER: Good morning, Your Honor. Eric
10 Fisher from Dickstein Shapiro and I'm appearing on behalf of
11 certain defendants in the Picard v. Legacy adversary
12 proceeding, which is 10-05286.

13 We are not objecting to the omnibus process. We
14 simply filed a statement that we hoped would be non-
15 controversial to indicate that we did not plan to
16 participate in the omnibus process. And the reason simply
17 is that we do not think that the interest of resolving our
18 case is well-served by the omnibus process because there are
19 so many different issues that are threshold issues to the
20 question of whether or not the plaintiff should be permitted
21 to file an amended pleading. That's segregating out the
22 extraterritoriality issue and deciding that issue. While it
23 will answer some questions relevant to the issue of whether
24 or not an amended pleading should be permitted, it's not
25 going to come close to answering all of the questions. And

1 so we simply wanted to insist on our rights under Rule 15
2 and require the plaintiff here to file a motion for an
3 amended complaint in our case and have the Court consider
4 that complaint -- that proposed amended complaint in its
5 entirety.

6 THE COURT: As I understand it, this order only
7 relates to the extraterritoriality issue with some discovery
8 issues involved in it also. So his concern is that if you
9 want to move to dismiss his complaint on some other ground,
10 or if he wants to move to dismiss your complaint on some
11 other ground, that somehow this order doesn't affect that
12 right.

13 MS. GRIFFIN: Your Honor, that's not exactly
14 correct. The entire purpose of this was to give order in
15 respect to the two significant decisions that came down: one
16 with the extraterritoriality issue, which is of course, the
17 defendants want to get that decided right away, but the
18 trustee also wanted to have his opportunity, either to take
19 discovery and then re-plead, or in cases where he hasn't
20 sought discovery, leave to re-plead given the change in
21 intervening law. And, you know, that issue is a common
22 procedural setting for every single one of these cases.

23 THE COURT: But the order really relates to your
24 right to re-plead. Basically, any extraterritoriality issue
25 of dismissal of the complaints?

1 MS. GRIFFIN: Your Honor, the way --

2 THE COURT: He's talking about a motion to dismiss
3 your complaint as it is on other grounds. How does the
4 order affect that?

5 MS. GRIFFIN: How it does is it's considering the
6 fact that we would be given -- well, first of all, I can't
7 even say for specific purposes in your case whether or not
8 the trustee would dispute the issue of whether or not he has
9 a right to re-plead as of right, but the more -- the bigger
10 issue is, now that the law has changed, in all of these
11 cases, the trustee wants the opportunity to put forward his
12 best complaint, the deal with the good faith issue, and the
13 whole point of structuring it this way was so that Your
14 Honor didn't get seriatim amendments to the complaints.

15 THE COURT: Right.

16 MS. GRIFFIN: The defendants are all going to --
17 we thought that this was a nice way of avoiding having them
18 file a motion to dismiss at an older complaint then we
19 respond to it, conform with allegations, you decide the
20 whole issue and then we -- we then deal with a second motion
21 on that proposed allegations. That's why we structured it.
22 So the way that this is working, and the way the parties
23 negotiated the proposed order was that we would deal with
24 the extraterritoriality issue first and then we'd have two
25 buckets of cases. In those in which the trustee is seeking

1 discovery so that we didn't have to put forward a full
2 amended complaint, we were going to have the Court -- come
3 back to the Court and ask you to revisit the issue of
4 discovery and need to re-plead at that time, depending on
5 whether we -- if we did seek discovery, we'd ask you to
6 decide the discovery motion first. In those cases where we
7 only sought leave to re-plead and we were not seeking
8 discovery because we had what we think we need, then we were
9 going to ask Your Honor to deal with those cases, but it's
10 structured that way.

11 THE COURT: I thought the discovery was related to
12 the good faith issue, or is it discovery for all issues?

13 MS. GRIFFIN: It's good faith issue.

14 THE COURT: Okay, so if you remove the good faith
15 issue and the extraterritoriality issue, his -- he's arguing
16 that -- if you want to amend the complaint in any other way,
17 you have to make a motion to leave to amend is what he's
18 basically saying, or one of the things I understand you to
19 be saying?

20 MR. FISHER: Correct, Your Honor.

21 MS. GRIFFIN: I think a lot of defendants will
22 probably take the same position. And the whole point is,
23 Your Honor, we think that that may be raised in a lot of
24 cases but we're trying to save time.

25 THE COURT: I don't understand, though. How does

1 the order -- how is the order supposed to affect your right
2 to re-plead on issues other than good faith and
3 extraterritoriality?

4 MS. GRIFFIN: I guess, Your Honor, it's -- it was
5 meant to address the change in intervening law that gives us
6 a reason to address those two issues, in particular, but it
7 also --

8 THE COURT: If you want to move to re-plead for
9 some other reason, another decision comes down, or the
10 Second Circuit makes some ruling in one of these appeals --

11 MS. GRIFFIN: Right.

12 THE COURT: -- what happens then? Is this -- is
13 there a schedule in here that controls that or do you have
14 to make another motion for leave to re-plead, or enter into
15 a similar stipulation on that issue?

16 MS. GRIFFIN: Your Honor, I mean it depends if
17 there's an intervening changing of law, but there are also
18 other issues at play. There's then new discovery that we
19 obtained from third parties that may be relevant. If we're
20 going to do this once, the whole point of this is to amend
21 once. We don't anticipate any other decisions coming down
22 except hopefully, you know, ones that we're going to seek to
23 appeal changing the law. But that's not where we are.

24 THE COURT: I guess I don't understand. I'm not
25 sure I got an answer to my question.

1 MS. GRIFFIN: All right, so I -- let me try to be
2 clearer. We are seeking leaving to amend for good faith
3 issues. But, for instance, what if we got more specific
4 information about banking transactions that leads us to
5 specificity about subsequent transfers that took place that
6 we didn't have when these complaints were first filed. And
7 in many of these cases, the trustee's position is, we still
8 have the right for (indiscernible) as of right across the
9 board. So we weren't looking -- we were looking to have the
10 Court decide the issue with regard to the intervening change
11 in law, but also we were working with the defendants to deal
12 with everything all at once so that we amend as once,
13 instead of asking permission for each issue.

14 THE COURT: What is the effect of this order on
15 your right to re-plead for any reason?

16 MS. GRIFFIN: I thought we had worked with the
17 defendants to come to a point where we could amend the
18 complaints once.

19 THE COURT: So this order grants you an absolutely
20 right to re-plead on any issue?

21 MS. GRIFFIN: No. Okay, we are seeking to proffer
22 amended allegations regarding the extraterritoriality issue
23 at this point only.

24 THE COURT: Okay.

25 MS. GRIFFIN: That's so that we don't have to put

1 forward a full amended complaint at this time until Your
2 Honor decides a discovery motion.

3 THE COURT: I'm hearing two different things.
4 Mr. Fisher is saying -- I understand his concern to be that
5 it gives you a right to amend for any reason and that if you
6 want to amend for any reason other than the
7 extraterritoriality issue or maybe the good faith issue
8 after discovery because it's dealt with, you should have to
9 come back and seek leave to re-plead. Is that what your
10 argument is, Mr. Fisher?

11 MR. FISHER: Yes, Your Honor, and just to --
12 again, it's just really how does this omnibus process apply,
13 for example, to this particular case because if the
14 pleadings -- if there are proposed amended pleadings as to
15 the extraterritoriality issue, and then this Court decides
16 certain defendants are foreign defendants and therefore not
17 subject to jurisdiction, certain defendants are not foreign
18 defendants within the meaning of Judge Rakoff's decision,
19 it's perhaps resolved in the extraterritoriality question,
20 but to get to the question of whether --

21 THE COURT: Unless they want to then re-plead
22 those complaints but --

23 MR. FISHER: That's true, but it doesn't resolve
24 the question of what if I also have arguments that the
25 subsequent transfers are not specified adequately to meet

1 the pleading requirements.

2 THE COURT: But that's a motion to dismiss and
3 this doesn't deal with a motion to dismiss, this deals with
4 a trustee's right to amend.

5 MR. FISHER: Your Honor, I --

6 THE COURT: I guess you can make a motion to
7 dismiss on any ground if you haven't done it already.

8 MR. FISHER: We -- I believe that that's right and
9 that we could, but I think even before you get to that
10 stage, we do have the right to oppose amendment of the
11 complaint --

12 THE COURT: Yes.

13 MR. FISHER: -- on the ground that it's futile.

14 THE COURT: Right.

15 MR. FISHER: So it could be that it enters into
16 the process at this stage and we shouldn't have to wait for
17 a motion to dismiss. We just want to know, ultimately, when
18 they -- this is a four year old case, like many of these
19 cases. We've been hearing for years that they plan to amend
20 the complaint in our case. When will we get our proposed
21 amended complaint? What claims are they planning to go
22 forward with? What's the basis for those allegations? And
23 we want the opportunity to say it's futile.

24 THE COURT: Okay.

25 MS. GRIFFIN: Your Honor, I guess what it comes

1 down to is some of the defendants are willing to proceed in
2 a certain fashion and I guess Mr. Fisher is not. I'm
3 assuming that you would not consent to allow us under Rule
4 15 leave to amend first. You want to make a motion and then
5 have us come forward with whatever our defense and
6 allegations would be to show that we can re-plead and have
7 that decided in that context instead of us, you know,
8 tendering a fully amended complaint first, and then you
9 target your motion to dismiss at that.

10 THE COURT: He's saying that he should make -- he
11 should have the right to test the allegations of your
12 proposed amended complaint before you get the right to re-
13 plead, which is what he's saying, which is the way it
14 usually works. And again, when I read this order, I thought
15 it was limited to the extraterritoriality and good faith
16 issues and that you could amend in accordance with the
17 order, you know, as to those issues. But again, I don't
18 know what other issues you might want to amend your
19 complaint to address. It might depend on what the law --
20 what law comes out of the Second Circuit, or this Court, or
21 the District Court on appeal. And I just can't give you
22 that kind of blanket right to amend. You tell me you think
23 you have the right to amend now, you don't need his
24 permission.

25 MS. GRIFFIN: In certain cases.

1 THE COURT: Okay, but beyond the specific two
2 issues that are covered by the order, I guess if you want to
3 seek leave to amend to some other reason, then you'll have
4 to do it -- you know, follow the usual route for it. Now, I
5 thought that's what the order provided, and I don't know
6 what the order would have to say in order to clarify that,
7 but have you given any thought to that having seen the
8 objection?

9 MS. GRIFFIN: No, Your Honor. Frankly, we were
10 confused by the objection.

11 THE COURT: All right, what we'll do at the end of
12 this process --

13 MS. GRIFFIN: Sure.

14 THE COURT: -- is I'll ask you to file a proposed
15 amended order online, redlined, which capsulate the changes
16 with UBS and Merrill, and one that you think will satisfy
17 Mr. Fisher. And then if there are no objection, you know,
18 give it -- provide three days' notice or -- of presentment,
19 and if there's an objection, someone can file an objection
20 to the language and we'll hear it further -- you'll have a
21 further hearing on it. Because there's just so many parties
22 involved, there's no other practical way to deal with it.

23 MS. GRIFFIN: Your Honor --

24 THE COURT: And I'll authorize ECF service for
25 this limited purpose.

1 MS. GRIFFIN: Thank you, Your Honor.

2 THE COURT: So you don't have to mail it out to
3 everybody, okay?

4 MR. FISHER: Thank you, Your Honor.

5 MS. GRIFFIN: Thank you.

6 THE COURT: Anybody else on the context of the
7 order?

8 MS. GRIFFIN: I think, Your Honor -- just to call
9 Your Honor's attention, it's in the agenda. There were a
10 couple of additional parties who sought to participate. We
11 conferred with counsel for coordinating counsel. They were
12 submitted last night and none of us got an objection to
13 that.

14 THE COURT: Okay, next.

15 MR. LONG: Your Honor, there was one other
16 submission on behalf of another proceeding Bureau of Labor
17 Insurance.

18 THE COURT: Yes, yes, yes. Is anyone here from
19 the Bureau of Labor Insurance? Step up.

20 MR. KUSHNER: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. KUSHNER: My name is Amiad Kushner from
23 Lowenstein Sandler on behalf of Bureau of Labor Insurance.

24 THE COURT: Okay.

25 MR. KUSHNER: I'll call Bureau of Labor Insurance,

1 BLI.

2 THE COURT: Okay.

3 MR. KUSHNER: So, Your Honor, we had been in
4 discussions with the trustee on this issue. We couldn't
5 agree, which is why we had to file that letter. We're just
6 seeking to have BLI join in the extraterritoriality motion.

7 THE COURT: But the trustee's not looking to amend
8 its complaint as to you. He's already won that right,
9 right?

10 MR. KUSHNER: And we would --

11 MR. LONG: That's right, Your Honor. This case
12 was fully briefed --

13 THE COURT: He's saying it's law of the case.

14 MR. KUSHNER: He -- but he's also conceded that
15 the law has changed. We think Judge Rakoff's decision
16 applies to --

17 THE COURT: I think the -- look, just to cut you
18 short, I read the letters and he's arguing that you're bound
19 by law of the case. If you don't like a decision, you have
20 to go and appeal. I suppose you can make another argument
21 -- you can make an argument that law of the case shouldn't
22 apply and that you should have an opportunity because of an
23 intervening change in the law to make a motion to dismiss,
24 which I guess you're free to make, but -- and I know you
25 have an interest in the issues and the issues may ultimately

1 determine the outcome of the motion I just mentioned, but
2 he's not seeking to amend his complaint as to you.

3 MR. KUSHNER: Yeah, and we're -- we think as a
4 matter of judicial efficiency, of course that is what's
5 going to happen. We're going to have to file a motion to
6 dismiss in our adversary proceeding. Instead of having
7 duplicative briefing on the exact same issue, why can't we
8 just say, you know, I can join in the exact same motion as
9 pending in front of the Court?

10 THE COURT: Because you are not a party to this
11 proceeding even though the issue that you're going to raise
12 is really the same issue, but you're in a different
13 situation from everybody else. You litigated the
14 extraterritoriality decision and you lost it, right, before
15 Judge Lifland.

16 MR. KUSHNER: Yes, but --

17 THE COURT: I read the decision yesterday. So
18 he's not looking to amend this complaint as against you, and
19 it comes down to that. This is a procedure designed to
20 facilitate the amendment of complaints to comply with the
21 extraterritoriality decision.

22 MR. KUSHNER: Your Honor, my understanding is
23 that, and the trustee can correct me if I'm wrong, is if we
24 did in fact file a motion for judgment on the pleadings and
25 then sought joinder of that motion with this pending

1 extraterritoriality motion, the trustee would decline to
2 grant his consent. Is that --

3 THE COURT: I don't know.

4 MR. KUSHNER: I just want to confirm on the record
5 that that is correct.

6 THE COURT: You can talk to him. I don't know
7 what he plans to do when as -- I don't even know what your
8 complaint says. Your complaint may be legally sufficient
9 even under Judge Rakoff's decision for all I know. I
10 haven't looked at it. I don't know what it alleges.

11 MR. KUSHNER: It alleges -- it's exactly the same.

12 THE COURT: Look, I'm not going to -- I told you
13 why I don't think you're entitled as a matter of right to
14 participate in this process. You're in a different
15 situation. In the end, you may be in the same situation,
16 but he is not seeking to amend his complaint as to you, and
17 that's what this procedure is designed to effectuate.

18 MR. KUSHNER: Okay.

19 THE COURT: All right.

20 MR. LONG: Thank you, Your Honor.

21 THE COURT: Well spoken. All right, next. Wait,
22 there's one more. I have this FIM.

23 MS. GRIFFIN: We're changing counsel.

24 THE COURT: All right. Like the Met bullpen.

25 Please hold it down. I have another matter. If you want to

1 speak, speak outside. What respect. Please, I have another
2 matter. If you want to speak, speak outside. Go ahead.

3 MS. PONTO: Geraldine Ponto, Baker Hostetler
4 representing the trustee.

5 MS. KLEINICK: Jodi Kleinick from Paul Hastings
6 representing FIM Limited, FIM Advisors, Frederico Ceretti,
7 and Carlo Grosso.

8 THE COURT: Okay, go ahead.

9 MS. KLEINICK: Your Honor, this is my request for
10 a conference so --

11 THE COURT: All right, I'll hear you.

12 MS. KLEINICK: -- you want us to go first. Your
13 Honor, all of my clients are foreign defendants who are
14 alleged to have received subsequent transfers from other
15 foreign entities. There's one cause of action asserted in
16 the complaint against them under sections 550 and 551 to
17 avoid and recover these subsequent transfers. We requested
18 this conference because we have been attempting to resolve a
19 dispute with the trustee's counsel for the past six months
20 over an objectively false allegation in the complaint that
21 my client supposedly have a New York bank account at Brown
22 Brothers Harriman. I can go through the history --

23 THE COURT: I read the papers -- I read online
24 what you filed with all the exhibits. I don't have a copy
25 of that, but I read it.

1 MS. KLEINICK: Okay. The allegation in the
2 complaint is a very clear one. It says "Kingate Management
3 pays -- paid fees to FIM Limited at its account with Brown
4 Brothers Harriman & Co. in New York, New York." The
5 allegation is absolutely false. FIM Limited never had any
6 account at BBH. It has always maintained its accounts at
7 MeesPierson Guernsey in the Channel Islands, and it has
8 never held any U.S. account.

9 In May, I wrote to the trustee's counsel and
10 advised the trustee's counsel that this allegation was
11 false. I explained that the BBH account that the trustee
12 was referring to in the complaint was actually an account
13 that belonged to MeesPierson Guernsey and that MeesPierson
14 used that account as a correspondent bank account.

15 Now the trustee rejected our letter, told us that
16 they had a good faith basis for the allegation and that they
17 looked forward to engaging with -- in discovery with us.
18 Now my clients have previously moved to withdraw the
19 reference on extraterritoriality grounds and then as Your
20 Honor knows, Judge Rakoff issued his decision on
21 extraterritoriality. And there are two significant things
22 to note about that decision in this context, and we're not
23 trying to argue the merits of the decision, but --

24 THE COURT: My question is what is the relief
25 you're seeking by letter today?

1 MS. KLEINICK: What we're trying to do, Your
2 Honor, and we've been trying on -- I'd say we've been going
3 above and beyond the call, is trying to resolve this without
4 filing a formal sanctions motion.

5 THE COURT: Okay.

6 MS. KLEINICK: We have provided the trustee to
7 date with three separate declarations and I'd like to just
8 walk you through them very quickly because I can't even
9 imagine, given where we are, that the trustee is taking the
10 position --

11 THE COURT: I understand your position. My
12 question is you've written a letter to me, what is the
13 relief that you think you're entitled to today by virtue of
14 that letter, that's all. It's a procedural question.

15 MS. KLEINICK: Well, procedurally what we would --
16 we need to address the allegation, okay? If the trustee --

17 THE COURT: So normally you make a motion for
18 summary judgment and, you know, you attach the exhibits.
19 And if they say -- if there's no response to it, then I
20 guess you've established that there's no New York account
21 and whatever flows from that is the result. But --

22 MS. KLEINICK: Well, Your Honor, Judge --

23 THE COURT: -- I'm just asking you what is --

24 MS. KLEINICK: Yeah, so --

25 THE COURT: You write a letter to the Court.

1 MS. KLEINICK: We write a letter to the --

2 THE COURT: It's not a motion. It's not a motion
3 for summary judgment. Do you expect me to tell him to stop?
4 I just I don't understand what it is you're looking for.
5 And I understand your frustration, but you know, we have
6 procedures for resolving disputes. I haven't heard from the
7 trustee. If the trustee doesn't have a good faith basis, I
8 suppose you can seek sanctions under 28 USC 1927, maybe the
9 inherent power. I don't know if you sent a safe harbor
10 motion. I don't know what you've done, but --

11 MS. KLEINICK: Well --

12 THE COURT: -- this is not the way you resolve
13 these kind of issues.

14 MS. KLEINICK: Your Honor, we have tried to
15 resolve this with the trustee and the reason that we're here
16 is because we need to address the allegation, okay?
17 Obviously, with - it's within the Court's inherent powers --

18 THE COURT: Okay, I agree with you --

19 MS. KLEINICK: -- to strike the allegation.

20 THE COURT: What is it that you -- what is it --
21 I'm not going to strike it pursuant to a letter.

22 MS. KLEINICK: Okay. Alternatively, we can move
23 for sanctions.

24 THE COURT: You can do that, you can move for
25 summary judgment.

1 MS. KLEINICK: Which we were trying to avoid.

2 THE COURT: I understand.

3 MS. KLEINICK: But the fact is, is that as of
4 today, we've given the trustee three separate declarations:
5 one from my client saying it's never had an account at BBH
6 and the account is actually a MeesPierson account; a sworn
7 declaration from MeesPierson telling the trustee that the
8 account is its account at BBH; and a third declaration from
9 BBH itself, the bank, saying my client has never had an
10 account at BBH. At this point, it is unethical for the
11 trustee's counsel to take the position that they can use
12 that allegation in the context of the upcoming
13 extraterritoriality briefing in order to try to force us
14 into discovery to trial and as an arrow in their quiver. It
15 is unfathomable that we have to be here now in an attempt to
16 try and resolve this in a judicially efficient way without
17 wasting the Court's resources or my client's resources.

18 THE COURT: What would you -- when you walk out of
19 here today, what relief is it that you would like?

20 MS. KLEINICK: Well, either -- if Your Honor is
21 not willing to strike the allegation under its inherent --

22 THE COURT: I don't have a motion before me. How
23 can I strike anything?

24 MS. KLEINICK: Well, you have the declarations.

25 THE COURT: I don't have a motion for them and --

1 MS. KLEINICK: Sua sponte -- the law is sua
2 sponte, Your Honor can strike the allegation under the
3 Court's inherent powers. You don't need a motion to do
4 that.

5 THE COURT: I got it. Let me hear from the
6 trustee.

7 MS. KLEINICK: But if Your Honor is not willing to
8 do that, what we'd like is a briefing schedule for our
9 sanctions motion.

10 MS. PONTO: Your Honor, I was interested to hear
11 what the status conference sought to achieve today. There
12 has been six months of correspondence back and forth. At
13 the time we filed this complaint in March of this year, that
14 allegation was made. That allegation also was made three
15 years ago in the third amended complaint.

16 THE COURT: Okay, but now she says she's given you
17 proof that shows it's not correct. Forget about what you
18 knew or didn't know --

19 MS. PONTO: Your Honor, on the face of the --
20 again, this dispute is focused on one allegation in our very
21 fulsome complaint against one particular defendant, FIM
22 Limited. While Paul Hastings may represent several
23 defendants, it is only as against FIM Limited. The premise
24 of this status conference through the correspondence that we
25 submitted is the extraterritoriality issue, which -- and

1 they've speculated as to -- when she talked about a quiver,
2 that they speculated as to the trustee's use of that
3 allegation in connection with extraterritoriality. We
4 haven't taken any extraterritoriality position yet.

5 With respect to those particular declarations, we
6 have not had an opportunity to confront those -- that
7 testimony, if you will. We'd like that opportunity. This -
8 - if they made a summary judgment motion, we'd be entitled
9 to discovery on that. If they believe it's sanctionable,
10 Your Honor, as far as 1927 goes, the basis for relief under
11 Section 1927 is multiplication of the proceedings. And if
12 any party has multiplied the proceedings, it has been the
13 Paul Hastings firm. We have engaged, we have demonstrated
14 that we have in good faith made the allegation. If you look
15 at the face of the invoice, it's on FIM Limited letterhead.
16 It's addressed to Kingate Management Limited, the management
17 company. It's an invoice for fees. It -- at the bottom it
18 has a couple of account numbers, MeesPierson being one. It
19 has an account number for FIM Limited. And it says in -- in
20 Brown Brothers Harriman, excuse me -- and it says in favor
21 of FIM Limited. I do not know, standing here today, whether
22 FIM Limited has any interest in that account or what, under
23 foreign banking terminology, in favor of means. And we
24 would like to explore that.

25 THE COURT: All right, look, as I indicated, I

1 can't grant any relief. This is more like a venting session
2 than an application for relief. I guess you can make a
3 motion for summary judgment. They'll ask for discovery
4 because I assume, they're saying they haven't had the
5 opportunity to take discovery of the affiants. They will
6 show me a document and I'll decide whether or not there's a
7 question of fact. In terms of sanctions, you can -- I mean,
8 I guess you can make the sanctions motion.

9 MS. KLEINICK: Your Honor, Judge Rakoff made very
10 clear in his decision --

11 THE COURT: Please don't argue the merits of this
12 to me. You have proceeded improperly. If you want relief,
13 make a motion and they'll respond, and then there are rules
14 on how the motion is decided. It is entirely improper to
15 write a letter and request relief by letter of the type of
16 relief you're seeking, okay?

17 MS. KLEINICK: Okay. Your Honor, can we have a
18 return date for the sanctions motion then?

19 THE COURT: My courtroom deputy is out today. You
20 can call her tomorrow and get a return date. Okay.

21 MS. KLEINICK: Thank you.

22 MS. PONTO: Thank you, Your Honor.

23 THE COURT: Thank you.

24 (Proceedings concluded at 10:42 a.m.)
25

C E R T I F I C A T I O N

I, Jamie Gallagher, certify that the foregoing transcript is
a true and accurate record of the proceedings.

Jamie Gallagher

Digitally signed by Jamie Gallagher
DN: cn=Jamie Gallagher, o=Veritext,
ou, email=digital@veritext.com, c=US
Date: 2014.11.20 16:53:34 -05'00'

Veritext

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: November 20, 2014